ANTHONY GOMEZ v. KETUA POLIS DAERAH KUANTAN

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) March 15, 1977]

[Kuala Lumpur — Federal Court Criminal Appeal No. 32 of 1976]

Criminal Law and Procedure — First information report Whether public document — Whether person interested has a right to obtain copy of report — Criminal Procedure Code, (F.M.S. Cap. 6), ss. 107 and 108A — Evidence Act, 1950, ss. 74, 76 and 77.

Administrative Law — Mandamus — Refusal of police officer to supply copy of first information report — Specific Relief Act, 1950, s. 44(1).

In this case the appellant had been charged with the offence of criminal intimidation by threatening one V. Bernard Vas. The appellant's solicitor applied for a copy of the first information report made by Mr. Vas but this was refused. The appellant thereupon applied for an order pursuant to section 44 of the Specific Relief Act that the O.C.P.D. supply a certified copy of the report to the appellant. The application was dismissed in the High Court and the appellant appealed to the Federal Court.

Held, allowing the appeal: although section 76 of the Criminal Procedure Code is silent as to the right of a person to inspect a first information report, it is clear that under the common law the appellant has that right as he is a person interested in it and inspection is necessary for the protection of his interest. The first information report is admissible in evidence in the criminal trial under section 57 of the Evidence Act and therefore the appellant or his counsel should be supplied with a copy.

Cases referred to:-

(1) *Mutter* v. *Eastern and Midlands Railways Co.* L.R. 38 Ch. D. 92.

(2) *Queen Empress* v. *Arumugam* I.L.R. 20 Mad. 189.

(3) *Chundy Churn Dhur* v. *Biostab Churn Dhur* 8 C.W.N. 125.

(4) *P.D. Shamdasani* v. *Sir Hugh Golding Cocke & Anor.* A.I.R. 1942 Bom. 26.

(5) *Rasipuram U.M. Service* v. *I.T. Commissioner* A.I.R. 1957 Mad. 151.

(6) *State of Madras* v. *G. Krishnan* A.I.R. 1961 Mad. 92.

FEDERAL COURT.

S. Sivasubramanian for the appellant.

M. Mahalingam (Deputy Public Prosecutor) for the respondent.

Suffian L.P. (delivering the judgment of the Court) (delivered by Wan Suleiman F.J.): This is the judgment of the court.

The applicant (appellant before us) was charged in the Kuantan Magistrate's Court in Arrest Case MA 190/75 as follows:

"That you on June 15, 1975 at about 9.00 a.m. in the compound of St. Thomas Church, Jalan Gambut, in the District of Kuantan, in the State of Pahang, committed criminal intimidation by threatening one Encik V. Bernard Vas with intent to cause alarm to the said Encik Bernard Vas, and that you have thereby committed an offence punishable under section 506 of the Penal Code."

The applicant's solicitor Mr. S. Sivasubramanian suspected that the charge was based on a report lodged by V. Bernard Vas on June 17, 1975, probably under section 107, Criminal Procedure Code. That section and section 108A read as follows: —

"107. (i) Every information relating to the commission of an offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction and be read over to the informant.

(ii) Every such information shall be entered in a book to be kept by such officer, who shall append to such entry the date and hour on which such information was given, and whether given in writing or reduced to writing as aforesaid shall be signed by the person giving it."

"108A. In any proceeding under this Code a copy of an entry relating to an information reduced to writing under the provisions of section 107 or of section 108, and purporting to be certified to be a true copy by the Officer in Charge of the Police District in which the police station where the information given is situated, shall be admitted as evidence of the contents of the original and of the time, place and manner in which the information was so recorded. (Section added by F.M.S. Enactment 19 of 1936)."

This report may be a first information report in which case it is admissible under section 108A, Criminal Procedure Code.

On December 20, 1975, the applicant's solicitor wrote to the O.C.P.D., Kuantan (respondent here and below), for a certified copy of the report "required by us to prepare our client's defence."

Invariably such a request is granted by the police, but this time it was refused on the ground, explained by the O.C.P.D. in a letter dated March 30, 1976, that the report was

"lodged by some one else, not your client. For your information, a copy of a report is supplied only to the person who makes the report or to his solicitor. Please therefore ask the person who makes the report to make the application himself."

On April 1, 1976, the solicitor wrote complaining to the learned Legal Adviser, Pahang, who is also Deputy Public Prosecutor, saying: —

"We find [the refusal of the O.C.P.D. to supply a copy of the report] a great hindrance in preparing our clients' defence as we must have particulars of the complaint against them. You will agree with us that it is both your duty and ours to see that justice is done and this can only be done if all admissible documents are supplied to the accused. If the first information report and the evidence of the complainant vary, it is the duty of both the prosecution and the defence to point it out the Bench. This can only be done if the defence has a copy of the first information report."

On May 10, 1976, the learned Legal Adviser replied, agreeing with the O.C.P.D.'s action.

On May 19, 1976, the applicant's solicitor applied by motion to the High Court for an order pursuant to section 44(1), Specific Relief Act, 1950 (Act 137), that the O.C.P.D. supply a certified copy of the report to the applicant.

In their correspondence the applicant's solicitor referred the O.C.P.D. to A.G. Circular No. 4 of 1955 as authorising the O.C.P.D. to supply a copy of the report. That circular reads as follows:

"*AG.FM. 3/55*

ATTORNEY-GENERAL'S CHAMBERS,
FEDERATION OF MALAYA,
KUALA LUMPUR.
17th May, 1955.

ATTORNEY-GENERAL'S CIRCULAR NO. 4 OF 1955

To All Deputy Public Prosecutors.

FIRST REPORTS

There appears at page 128 of *Mallal's* Criminal Procedure Code (3rd Edition) the following comment:

'Police Report is a Public Document. — A report to Police

is a public document within the meaning of section 74 of the Evidence Ordinance as it is a record of the act of a police officer....'

2. The authority quoted for this comment is the case of *Queen Empress* v. *Arumugam* I.L.R. 20 M. 189. That case related to reports made *by* the police under the section of the Indian Procedure Code which corresponds to section 121 of the Straits Settlements Code and *section 110* of the Federated Malay States Code. The case has no bearing upon first information reports made *to* the police under section 117 of the Straits Settlements Code corresponding to *section 107* of the Federated Malay States Code. [There] are, in fact, dicta in that case [that] support the opinion already expressed in these Chambers that first reports made to the police under these sections are not public documents within the meaning of section 74 of the Evidence Ordinance, 1950.

3. No right is therefore conferred by section 76 of the Evidence Ordinance upon any person to demand a copy of a first report. However, where a first report would be admissible as evidence in a criminal case (i.e. to corroborate or discredit the informant where he is called as a witness), the accused person or his Counsel may ordinarily be supplied with a copy of the first report. Where, on the other hand, it is not intended to call the informant as a witness a copy should not be given.

4. It should be borne in mind that there may be cases where the supply of a copy of a report might be against public interest e.g. by leading to intimidation or reprisals. In such cases refusal to supply a copy might well be justified.

Sgd. M.J. HOGAN
ATTORNEY-GENERAL,
FEDERATION OF MALAYA."

Sections 74 and 76 of the Evidence Ordinance, 1950 (now Evidence Act (Revised 1971) Act 56) read as follows: —

"74. The following documents are public documents:

(a) documents forming the acts or records of the acts of —
  (i) the sovereign authority;
  (ii) official bodies and tribunals; and
  (iii) public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of a foreign country; and

(b) public records kept in Malaysia of private documents."

"76. Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate, written at the foot of the copy, that it is a true copy of the document or part thereof, as the case may be, and the certificate shall be dated and subscribed by the officer with his name and his official title, and shall be sealed whenever the officer is authorized by law to make use of a seal, and the copies so certified shall be called certified copies."

It is also convenient to reproduce section 77 of the Evidence Act as follows: —

"77. Copies certified in the manner set out in section 76 may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

Opposing the application, the O.C.P.D. in his affidavit stated that the circular clearly explained that in the circumstances of this case the applicant had no right to a certified copy of the report and further that first information reports made to the police under section 107 of the Criminal Procedure Code are not public documents and that no right is conferred by section 76 of the Evidence Act on any person to demand a copy.

Before us it is conceded on behalf of the O.C.P.D. that this first information report *is* a public document as defined by section 74. We agree that it is a public document.

Thus the question in this appeal is this: is this first information report a public document which the applicant has a right to inspect within section 76? If it is, then the O.C.P.D. should have given him a copy on payment of the legal fee therefor.

The learned judge ruled that it was not and therefore the O.C.P.D. was not bound to give the applicant a copy.

He gave his reasons as follows:

"The following facts seem to confirm the view that a report lodged to the police is not a public document which the public have the right to inspect. Provisions almost identical to the present section 77 of the Evidence Act which provides that certified copies may be produced in proof of the contents of public documents had been in existence in section 77 of the old Evidence Enactment F.M.S. Cap. 10 since before 1936. In 1936 section 108A was introduced into the Criminal Procedure Code F.M.S. Cap. 6, which provided that a copy of an entry relating to an information reduced to writing under section 107 of the Code and purporting to be certified to be a true copy by the Officer in Charge of the Police District shall be admitted as evidence of the contents of the original. In my opinion if such report was a public document which the public had the right to inspect, it would not have been necessary to introduce section 108A of the Criminal Procedure Code, as a copy of such report would have already been admissible in evidence under section 77 of the Evidence Enactment, F.M.S. Cap. 10. In my opinion the fact that the Criminal Procedure Code was amended so as to include in it section 108A shows that the legislature had never intended such report to be a public document open to inspection by the public."

In our judgment the applicant *has* a right to inspect the first information report and therefore the O.C.P.D. should have given him a certified true copy. The applicant has a right to inspect the first information report under the common law because of his interest in it.

In *Mutter* v. *Eastern and Midlands Railway Co.*,[1] Lindley L.J. at page 106 said:

"When the right to inspect and take a copy is expressly conferred by statute, the limit of the right depends on the true construction of the statute. When the right to inspect and take a copy is not expressly conferred, the extent of such right depends on the interest which the applicant has in what he wants to copy and on what is reasonably necessary for the protection of such interest. The common law right to inspect and take copies of public documents is limited by this principle...."

In *Queen Empress* v. *Arumugam*,[2] the 1898 Full Bench decision of the Madras High Court (four judges) referred to in A.G. Circular No. 4 of 1955, it is true that the report dealt with there was not a report to the police but one *by* them (which was held not to be a public document within section 74 of the Indian Evidence Act which is *in pari materia* with our section 74 and therefore the applicant there had no right to inspect it); but nevertheless there is this passage at page 196 from the judgment of Shephard J. dealing with general principles which in my opinion apply to first information reports made under our Code:

"Neither in the Criminal Procedure Code nor in the Evidence Act is there any provision declaring or limiting the right of private persons interested in criminal proceedings to inspect documents in the hands of third parties. A right to inspect public documents is, however, assumed in section 76 of the Evidence Act; and, having regard to the authorities cited in the order of reference, I think it may be inferred that the legislature intended to recognize the right generally for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such

documents should be given. Within the limit the right appears to be recognized according to the English authorities. In the present case there can be no question as to the interest of the party who claims inspection. It is plain that a person charged with an offence is legitimately interested in knowing beforehand the particulars of the charge made against him, and the names of the witnesses who are going to support it. His interest is none the less a legitimate one, because some persons might make improper use of the information so obtained. If, therefore, the documents sought to be inspected are public documents, and if they are unprotected by special privilege, it follows that the claim to inspection must be allowed."

In a subsequent case decided in 1903 in Calcutta, *Chundy Churn Dhur* v. *Biostab Churn Dhur*,[3] Henderson J. said at page 132:

"I agree with the opinion expressed by Mr. Justice Shephard in *Queen Empress* v. *Arumugam* that it 'might be inferred that the legislature intended [by section 76 of the Evidence Act] to recognise the right generally, that is the right to inspect public documents, for all persons who can show that they have an interest for the protection of which it is necessary that liberty to inspect such documents should be given'."

In 1942 a similar problem was considered by the Bombay High Court in *P.D. Shamdasani* v. *Sir Hugh Golding Cocke & Anor.*[4] There Beaumont C.J. at page 26 said:

"Reference has been made to section 76, Evidence Act, but that section does not really assist us on the point we have to determine. All that that section does is to give to a party, who has the right to inspect a public document, as defined in section 74, the right to demand a copy of it on certain terms. But the right conferred by that section is confined to persons who have the right to inspect a document, and the Evidence Act does not specify the persons who have a right to inspect public documents. There would seem to be in England a common law right of inspection of public documents by a person interested in the document, so far as may be necessary for the protection of such interest."

In 1957 this question was considered in the Madras High Court in *Rasipuram U.M. Service* v. *I.T. Commissioner*[5] when Rajagopalan J. said at page 153: — "The test prescribed by section 76 of the Evidence Act is whether the person who applies for a copy of a document has a right to inspect it....

Whether any other person would have a right to inspect that document would be irrelevant. It is the person who has a right to inspect that is given the right to obtain a copy. That is the scheme of section 76 of the Evidence Act."

In 1961 the Full Bench of the Madras High Court (three judges) again considered this question in *State of Madras* v. *G. Krishnan*[6] when Ramachandra Iyer J. said at page 96:

"Section 76 entitles a person, who has a right to inspect a public document, to a certified copy thereof. The section, however, does not specify the persons who would be entitled to inspect a public document. But judicial decisions have long ago settled that question. It has been held that the right to inspect a public document is correlated to the interest which the person who seeks inspection in the document; a mere curiosity or even an interest in some other matter which could perhaps be better served by the inspection, would not be sufficient."

From the above we would deduce the law to be as follows: though our section 76 is silent as to the right of the applicant to inspect the first information report in question, it is clear that under the common law he has that right, as he is a person interested in it and inspection is necessary for the protection of his interest. This first information report is admissible in evidence in the criminal trial against him under section 157 of the Evidence Act and therefore the applicant or his counsel should be supplied a copy.

If a certified copy of the first information report in question is supplied to the applicant, it is admissible in evidence under section 77 of the Evidence Act. What was then the point of adding section 108A Criminal Procedure Code in 1936? The learned judge who considered this action thought that the point was that the legislature had never intended that a person such as the applicant should have a right of inspection under section 76 of the Evidence Act.

With respect it would appear to us that in 1936 the legislature overlooked the fact that under the common law such a person already had that right, as was declared as long ago as in the year 1888 in *Mutter*.[1]

We would therefore allow this appeal. The learned judge's order is set aside and instead there shall be an order in terms of the motion.

Appeal allowed.

Solicitor: *S. Sivasubramanian.*

GOH HOOI YIN v. LIM TEONG GHEE & ORS.

[O.C.J. (Arulanandom J.) November 17, 1975]
[Penang — Civil Suit No. 212 of 1974]

Practice and Procedure — Discovery of documents — Inspection of third party's documents — R.S.C. 1957, O. 31 r. 15.

Banking — Inspection of bank accounts — Bankers' Books (Evidence) Act, 1949, s. 7(1).

The plaintiff applied for discovery and inspection of books of the 3rd defendants, who were bankers, in respect of the accounts of the other defendants with the bank. The defendants opposed the application on the ground that it was irrelevant.

Held: (1) the main object of the provisions of the Bankers' Books (Evidence) Act is to enable evidence to be procured and given and to relieve bankers from the necessity of attending and producing their books. They do not give any new power of discovery or alter the principles of law or the practice with regard to discovery;

(2) in this case the accounts sought to be inspected are the accounts of a different company with limited liability and registered under the Companies Act, albeit the two directors are the same persons. Furthermore the question of in what circumstances a court could order inspection of accounts of third parties has been considered in many leading cases and it has been held that the jurisdiction of the court in such matters must be exercised with great caution;

(3) it is settled law that in an application of this nature if the opposite party states on affidavit that the information sought is irrelevant, it is final and the court should not at this stage question it.

Cases referred to:-

(1) *South Staffordshire Tramways Co.* v. *Ebbsmith* [1895] 2 Q.B. 669, 675.

(2) *Parnell (formerly O'Shea)* v. *Wood & Anor.* (1892) 17 P.D. p. 137.

(3) *Howard* v. *Beall* (1889), 23 Q.B.D. 1.

(4) *Tunstall* v. *Steigmann* [1962] 2 Q.B. 593.

(5) *Pollock* v. *Garle* [1897] Ch. 1.

CIVIL SUIT.

Goh Kooi Choo (Miss) for the applicant.